U.S. Department of Justice

Immigration and Naturalization Service

V

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC 99 178 52149 Office: Vermont Service Center Date: MAR - 7 2000

IN RE: Petitioner: [redacted]
Beneficiaries

Petition: Petition for a Nonimmigrant Worker Pursuant to § 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(ii)(b)

IN BEHALF OF PETITIONER: Self-represented

Public Copy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

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prevent clearly unwarranted
invasion of personal privacy

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: This is a motion to reconsider the Associate Commissioner for Examination's decision withdrawing the approval of the nonimmigrant visa petition. The motion to reconsider will be granted and the previous decision affirmed.

The petitioner is a figure skating club. It desires to employ the beneficiaries as ice dance skating instructors for a period of 11 months or one skating season (fall to spring/summer). The Department of Labor determined that a temporary labor certification by the Secretary of Labor could not be made because the hours indicated are considered part-time and part-time employment is not certifiable. The director determined that a temporary need had been established and approved the petition. The director certified his decision to the Associate Commissioner for Examinations for review. Upon review, the Associate Commissioner withdrew the director's approval of the visa petition.

On motion, the petitioner states that its employment is seasonal and part-time because ice is not available all year long and its program does not operate 12 months.

Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(ii), defines an H-2B temporary worker as:

> ...An alien having a residence in a foreign country which he has no intention of abandoning, who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession....

Matter of Artee Corp., 18 I&N Dec. 366 (Comm. 1982), as codified in current regulations at 8 C.F.R. 214.2(h)(6)(ii), specified that the test for determining whether an alien is coming "temporarily" to the United States to "perform temporary services or labor" is whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling. See 55 Fed. Reg. 2616 (1990).

The petitioner's need for the services or labor must be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 8 C.F.R. 214.2(h)(6)(ii)(B). The petition indicates that the employment is a seasonal need.

The regulation at 8 C.F.R. 214.2(h)(6)(ii)(B)(2) states that for the nature of the petitioner's need to be a seasonal need, the petitioner must establish that the services or labor is

traditionally tied to a season of the year by an event or pattern and is of a recurring nature.

The petition indicates that the dates of intended employment for the beneficiaries are as follows:

October-March	ice dance for only 5 hours per week
April-May	ice dance for only 4 hours per week
June-	no program
July-August	4 hours per week
September	no program

The Application for Alien Employment Certification (Form ETA 750) indicates that the beneficiaries will be employed part-time (12 hours per week) and paid a salary of $40 per hour. The nontechnical description of the job on Form ETA 750 reads "instruction/partnering female ice skaters for USFSA preliminary through international dance tests."

The petitioner states in its letter dated July 8, 1999 that the figure skating club has no permanent staff. The petitioner also states that all of its instructors are hired for one year, or one skating season (fall to spring/summer). Therefore, the petitioner's need for skating instructors cannot be considered as temporary. The petitioner has a permanent need for male skating instructors for its ice dance program to continue.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden.

ORDER: The order of June 17, 1999 withdrawing the approval of the nonimmigrant visa petition is affirmed. The petition is denied.